Supreme Court, U. S.
FILED
JUL 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No.....79-124

CLEMENT J. SHEERAN, *et al.*,
Petitioners,

v.

GENERAL ELECTRIC COMPANY, a
New York Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

The petitioners, Clement J. Sheeran, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1979.

OPINION BELOW

The memorandum decision and order of the United States District Court for the Eastern District of Washington, the order modifying that memorandum, the opinion of the United States Court of Appeals for the Ninth Circuit and the order of the United States Court of

Appeals for the Ninth Circuit denying the petition for rehearing appear in the appendix. The orders are unreported; the opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 24, 1979. A timely petition for rehearing was denied on April 16, 1979. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether one must seek appellate review before final judgment of a federal trial court's denial of a challenge to removability on jurisdictional grounds.
2. Whether federal jurisdiction may be asserted under the Labor-Management Relations Act Section 301 where no violation of a contract between an employer and a labor organization has been pleaded.
3. Assuming, *arguendo,* that certain parties are subject to federal jurisdiction, whether that jurisdiction may be extended to others as pendent parties.
4. Whether the Court of Appeals has decided a fundamental question involving the Washington State statute of limitations in a way that conflicts with applicable state law.

STATUTORY PROVISIONS INVOLVED

Labor-Management Relations Act Section 301(a); 29 USC 185(a)

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

In April, 1972, more than 1500 individuals (the petitioners; here called the "vestees") sued the General Electric Company (GE) in the Superior Court of the State of Washington because GE refused to accord them certain cost-of-living increases in their retirement pensions. (RA 6-7) The pensions had been earned by the vestees as GE employees at the federal government's Hanford atomic energy project near Richland, Washington. (RA 159)

GE removed the case to the United States District Court for the Eastern District of Washington. (RA 1) The vestees' motion to remand was denied and federal question jurisdiction or diversity jurisdiction was found by the district court. (RA 94)

After rejecting one of the two substantive theories advanced by the vestees, they were granted permission to take an interlocutory appeal:

> ...on the question whether the district court erred in denying summary judgment to the plaintiffs... (RA 183; Appendix B)

The district court's judgment was affirmed and a petition to this Court for certiorari was denied. 421 U.S. 913. On remand the vestees' claims were dismissed as time-barred

by the Washington State three-year statute of limitations. On appeal this judgment was affirmed and federal question jurisdiction under the Labor-Management Relations Act was upheld. Moreover, the vestees were held to have been too late in seeking review of the removal to federal court. (Appendix E)

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH AT LEAST ONE OTHER CIRCUIT AS TO WHEN ONE MUST SEEK REVIEW OF FEDERAL REMOVAL.

After concluding that the vestees could have originated their action in federal court, the Ninth Circuit held that they "are precluded from raising the remand issue on this appeal." (Appendix E) The court recognized that its decision was in an area of conflict among the circuits and cited a noted text's discussion of the point. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction,* Section 3740 at 769.

The vestees' position is similar to that found in *La Chemise Lacoste v. The Alligator Company,* 506 F. 2d 339, 342 (3rd Cir. 1974) certiorari denied, 421 U.S. 937, 44 L. Ed. 2d 94, 95 S. Ct. 1666:

> Accordingly, we reject appellee's contention that appellants, by waiting until appeal from final judgment, have waived the right to challenge the denial of the motion to remand.

Here, the vestees had only a permissive interlocutory appeal prior to the appeal from final judgment and that permission was limited, expressly, to one issue. (Appendix B) Logically, if a party's failure to raise the removal issue

on an interlocutory appeal to which it has a right (as in *Alligator*) does not preclude it from challenging removability after final judgment, then, *a fortiori,* the vestees should not be precluded as they were here where their only appeal before final judgment was permissive and narrowly circumscribed.

The Ninth Circuit's opinion below conflicts with *Alligator.* Other circuits have rendered opinions on this point that also conflict with *Alligator,* namely: *Kysor Industrial Corporation v. Pet, Incorporated,* 459 F. 2d 1010 (6th Cir. 1972) and *Beech-Nut, Inc. v. Warner-Lambert Company,* 480 F. 2d 801 (2nd Cir. 1973) This conflict, bearing as it does on a fundamental question of federal jurisdiction, is likely to recur. It should be resolved by this Court.

The Ninth Circuit's opinion erroneously relies on *Grubbs v. General Electric Credit Corp.,* 405 U.S. 699, 31 L. Ed. 2d 612, 92 S. Ct. 1344 (1972) as a means of distinguishing the instant case from *Alligator.* This reliance is misplaced because unlike *Grubbs* the vestees here: conceded no grounds for federal jurisdiction; objected to removal; and tried nothing on the merits. Therefore, the conflict with *Alligator* is authentic.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH AT LEAST ONE OTHER CIRCUIT ON THE ISSUE OF FEDERAL JURISDICTION UNDER THE LABOR-MANAGEMENT RELATIONS ACT SECTION 301 AND DEPARTS FROM PRINCIPLES GOVERNING REMOVABILITY THAT HAVE BEEN ARTICULATED BY THIS COURT.

In *Union Central Life Ins. Co. v. Hamilton Steel Products, Inc.,* 374 F. 2d 820, 823 (7th Cir. 1967), a suit involving a pension plan was held not to present a basis for

federal jurisdiction under Section 301(a) of the Labor-Management Relations Act. This decision conflicts with that of the Ninth Circuit in the instant case. Here, the Ninth Circuit held that because approximately one-third of the plaintiffs might have sued GE under Section 301, the case was properly subject to Section 301 jurisdiction. This position was reached by the Ninth Circuit despite the fact that no labor organization was a party to this suit and no contract between an employer and a labor organization was alleged to be violated in the complaint. See: *Nedd v. United Mine Workers of America,* 400 F. 2d 103 (3rd Cir. 1968)

In addition to presenting a conflict with the Third Circuit, the decision of the Ninth Circuit herein departs from well-established principles of this Court governing removal of cases to federal court. Fundamental to any determination of removability is the principle that the basis for federal jurisdiction must appear from the complaint. The plaintiff has the prerogative of determining whether to draft his pleadings to allow a basis for federal jurisdiction. These controlling principles were fully discussed by Justice Frankfurter in *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 672, 94 L. Ed. 1194, 70 S. Ct. 876 (1950):

> "Not every question of federal law emerging in a suit is proof that a federal law is a basis for the suit." *Gully v. First Nat. Bank,* 299 US 109....Ever since *Metcalf v. Watertown,* 128 US 586...it has been settled doctrine that where a suit is brought in the federal courts "upon the sole ground that the determination depends upon some question of a federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit

> is of that character." But "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." *Tennessee v. Union & Planters' Bank,* 152 US 454, 464....

The opinion below flies in the face of these principles.

Here there is no question of federal law impinging on, much less central to, the vestees' claims. The vestees pleaded no federal basis for their claim. Their claims have been grounded solely on state law. The opinion below concludes that simply because one-third of the vestees were covered by collective bargaining contracts this case arises under Section 301 of the Labor-Management Relations Act. This contention ignores the facts that approximately one thousand plaintiffs were part of no collective bargaining unit and had no employment terms set by any contract between an employer and a labor organization. Furthermore, this contention ignores the fact that this action arises from a pension plan--not a contract between an employer and a labor organization. No federal question was pleaded or presented. The Ninth Circuit's opinion that one might have been departs from controlling authority and expands federal jurisdiction without legal foundation.

III. *IMPLICIT IN THE NINTH CIRCUIT'S DECISION IS THE NOTION OF PENDENT PARTY JURISDICTION ON WHICH THERE IS CONFLICT AMONG THE CIRCUITS AND WHICH SHOULD BE SETTLED BY THIS COURT.*

Although the Ninth Circuit's opinion upheld jurisdiction on federal question grounds rather than diversity, there remains, implicit in its decision, the matter of

"pendent party" jurisdiction. Assuming, *arguendo,* that federal jurisdiction may be asserted under the Labor-Management Relations Act Section 301 over some of the vestees, there remain approximately two-thirds over whom no such jurisdictional base may be predicated. These vestees' claims were, apparently, anchored to the 521 vestees' claims that the Ninth Circuit found to be subject to Section 301 jurisdiction.

The Ninth Circuit has explicitly rejected the doctrine of pendent party jurisdiction. *Hymer v. Chai,* 407 F. 2d 136, 137 (9th Cir. 1969); *Ayala v. United States,* 550 F. 2d 1196 (9th Cir. 1977), certiorari dismissed, 435 U.S. 982, 56 L. Ed. 2d 76 , 98 S. Ct. 1635 (1978). The decision in the instant case allows, by implication, pendent party jurisdiction. Thus, the Ninth Circuit without overruling *Hymer* and *Ayala,* has aligned itself with other circuits that accept the doctrine of pendent party jurisdiction. *Wilson v. American Chain & Cable Company,* 364 F. 2d 558 (3rd Cir. 1966); *F.C. Stiles Contracting Co. v. Home Insurance Co.,* 431 F. 2d 917 (6th Cir. 1970); *Stone v. Stone,* 405 F. 2d 94 (4th Cir. 1968); *Hatridge v. Aetna Casualty & Surety Company,* 415 F. 2d 809 (8th Cir. 1969). Generally, it is unclear whether pendent parties, as opposed to claims, may be anchored to other parties' federal claims in the same case. There is a conflict among the circuits on this issue. Although the opinion below does not address this point directly, the issue was silently resolved therein. This question should be settled so that litigants may reconcile the liberal joinder provisions of the federal rules with the more restrictive requirements of federal jurisdiction.

IV. *THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED A FUNDAMENTAL QUESTION INVOLVING STATE LAW IN A WAY THAT CONFLICTS WITH APPLICABLE STATE LAW.*

Any party may appropriately urge the statute of limitations, nevertheless, Washington authority does not favor it. As held in *Guy F. Atkinson Co. v. State,* 66 Wn. 2d 570, 573, 403 P. 2d 880 (1965):

> However, the statute of limitations is not such a meritorious defense that either the law or the facts should be strained in aid of it. *Rochester v. Tulp,* 54 Wn. 2d 71, 337 P. 2d 1062 (1959); *Wickwire v. Reard,* 37 Wn. 2d 748, 226 P. 2d 192, 23 A. L. R. 2d 1323 (1951).

GE's protestations regarding the statute of limitations should be viewed in the light of this authority that clearly disfavors such a defense.

In this case, the vestees alleged that GE misrepresented and failed to disclose material facts relative to their pension rights under the written GE pension plan. The vestees relied to their detriment on GE's misrepresentations and, accordingly, the vestees contend that GE should be estopped from asserting certain portions of the written plan that might disqualify the vestees. The district court ruled that the vestees' claims were time-barred pursuant to the three-year Washington State statute of limitations. RCW 4.16.080. This ruling was a clear departure from Washington law.

A circumstance or condition whereby reference is made to material factors apart from a written contract, does not remove the underlying litigation from the coverage of the

Washington State statute which prescribes a six-year limitation on (RCW 4.16.040):

> An action upon a contract in writing or liability express or implied arising out of a written agreement.

Thus, under Washington law, an estoppel or some other consideration created by law may operate to "edit" an adverse provision from a written agreement or otherwise permit enforcement of terms thereof, without removing the legal action bringing such claim from coverage of the six-year limitation established by RCW 4.16.040. *McDonald v. Wockner,* 44 Wn. 2d 261, 276, 267 P. 2d 97 (1954); *Malcom v. Yakima County Consolidated School District,* 23 Wn. 2d 80, 159 P. 2d 394 (1945). The district court understood the holding of *Malcom* in a manner that is totally inaccurate and the Court of Appeals for the Ninth Circuit accepted that inaccurate understanding uncritically and completely.

In both *McDonald* and *Malcom,* the Supreme Court of the State of Washington expressly rejected the argument accepted below, *i.e.,* the argument that when reference is made by a plaintiff to a factor apart from a written contract so as to enable enforcement of that contract, or a portion thereof, his action as governed by the statute of limitations relating to the enabling factor and not by the statute of limitations pertaining to the written contract or claims arising therefrom.

For some erroneous reason the district court was insistent that *Malcom,* involved "subsequent attempted modifications" of a written agreement; the fact is, in *Malcom,* the plaintiff successfully invoked public policy as the means for "editing" an unfavorable provision from a

written contract. The plaintiff was granted enforcement of the remaining terms notwithstanding the defendant's contention that the plaintiff had not brought the action within the limitation applicable to claims based on the public policy. This egregious misinterpretation of Washington State law should be rectified on review.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated this 11th day of July, 1979.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Clement J. Sheeran, et al., Plaintiff-Petitioner vs. General Electric Company, Defendant-Respondent	No. 73-8335

Before: MERRILL and WRIGHT, Circuit Judges

ORDER

Permission to take an interlocutory appeal in this matter, on the question whether the district court erred in denying summary judgment to plaintiffs, is granted. The motion to stay proceedings in the district court is denied.

s/CHARLES M. MERRILL
s/EUGENE A. WRIGHT
U. S. Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASINGTON

Clement J. Sheeran, et al., Plaintiffs, vs. General Electric Company, Defendant.	No. 2843 MEMORANDUM AND ORDER

Plaintiffs are former employees of defendant General Electric Company at the Hanford atomic project in Richland, Washington, most of whom were terminated in 1965 when defendant lost its status as a contractor and discontinued its operation on the project.

Prior to their leaving the employment of the defendant, each of the plaintiffs had sufficient service with defendant to have acquired vested rights to a General Electric pension in accordance with Section XII of the General Electric Pension Plan. In 1961 and 1963, the defendant amended its pension plan and granted certain pension increases to all categories of beneficiaries under the plan. Increases again were granted, effective January 1, 1967 and January 1, 1971, but plaintiffs were excluded from these increases.

The plaintiffs, some 1600 of them, brought suit in the Superior Court in Benton County on April 26, 1972, seeking a Declaratory Judgment alleging they were entitled to the 1967 and 1971 increases. The defendant removed the case to the Federal District Court on May 15, 1972. The plaintiffs, through their complaint and the Preliminary Pretrial Order, dated August 8, 1973, sought recovery under two theories: (1) direct recovery on the contract under the Pension Plan, and (2) indirect recovery on a theory of equitable estoppel. In response to plaintiffs

motion for summary judgment, the Court ruled that no recovery was available under the direct contract language of the pension plan. (Memorandum Decision and Order, dated September 13, 1973, *affirmed, Sheeran v. General Electric Company,* No. 73-3346 (9th Cir. unpublished December 16, 1974), *cert. denied,* 421 U.S. 913 (1975).

Plaintiffs now seek recovery, not on benefits or rights stated in the General Electric Pension Plan, but by seeking to have those rights and benefits extended to them by reason of certain claimed outside oral or written representations. No court action was undertaken after denial of *certiorari* until October, 1976, when the Court called a status conference to determine if the remaining issue should be dismissed. On March 9, 1977, the defendant filed the present motion to dismiss the remaining contention of this case.

The motion to dismiss is based upon four grounds: (1) the statute of limitations, (2) the parol evidence rule, (3) the statute of frauds, and (4) an alleged failure to prosecute.[1]

---

[1]While the Court does not base its decision upon this fourth issue, it is significant to note that when the Ninth Circuit accepted the interlocutory appeal under 28 U.S.C. S1292(b) on the "contract" aspect of this case, the court denied the motion to stay proceedings pending the outcome of the appeal. (Order, No. 73-8335, dated December 5, 1973). Nevertheless, plaintiffs took no further action on this second theory of estoppel until the Court called a status conference on its own motion on October 1, 1976, some eighteen months after denial of *certiorari,* and thirty-four months after acceptance of the interlocutory appeal. The only activity by plaintiffs prior to the Court calling its status conference and the subsequent motion to dismiss herein decided, was a set of interrogatories, consisting of six questions, sent to defendent on December 26, 1974.

For the reasons set forth below, only the first ground need be discussed.

The Revised Code of Washington contains two statutes of limitation applicable to contracts:

> RCW 4.16.040 Actions limited to six years.
> Within six years:
> ...
> (2) An action upon a contract in writing, or liability express or implied arising out of a written agreement.
>
> RCW 4.16.080 Actions limited to three years.
> Within three years:
> ...
> (3) An action upon a contract or liability, express or implied which is not in writing, and does not arise out of any written instrument.

The plaintiff maintains that because this suit is based fundamentally upon the written plan, the action lies under the six year statute as one "upon a contract in writing based upon implied liability arising out of the written agreement." Plaintiff cites two cases, *McDonald V. Wockner,* 44 Wn2d 261, 267 P.2d 782 (1954) and *Malcom v. Yakima County Consolidated School District,* 23 Wn.2d 80, 159 P.2d 394 (1945), in support of the principle that the six year statute of limitations applies. Both cases are distinguishable from the present action in that they involved enforcement of a written contract after subsequent oral contracts were held invalid. In each of those cases, the actual recovery allowed was based upon specific enforcement of the written contract. In the present action, of course, no recovery is possible upon the written contract, as already determined.

A thorough discussion of the Washington statutes of limitation is found in *Halver v. Welle,* 44 Wn.2d 288, 266

P.2d 1053 (1954). That case involved a written contract to build a house for a specified sum. Due to a subtraction error, the payment due on the contract was erroneously calculated to be $1000 more than it should have been. The incorrect sum was paid and, when discovered some five years later, the owners brought suit for recovery of the overpayment; defendants set up the three year statute of limitations as a bar. The court noted that the contract did not specify for a return of money in case of overpayment and then reviewed the Washington cases discussing the two statutes of limitation and their relationship to written contracts and implied-in-law or quasi-contracts. The court concluded that where an underlying obligation to pay upon a written contract existed, but where the specific payment sought to be recovered was not contemplated by the terms of that instrument, it could not be said to have been made on a written contract or agreement, and not being so made, the implied liability to repay did not arise out of a written instrument. Hence the three year statute of limitations applied.

> While necessary implication is as much a part of an instrument as an express provision is, the implication must, nevertheless, be such as is within the contemplation of the parties when making the contract, or else necessary to carry their intention into effect. Under such circumstances only will the law imply and enforce the obligation. *Id.* at 293.

Applying the *Halver* reasoning to the present action this Court has found that a written pension plan existed, but that it contained no provision for plaintiffs to receive the specific pension increases sought.

> No vestee, therefore, could have had a vested right to any increase granted by one of the amendments unless such increase was granted specifically to vestees by the amendment itself. Obviously, the

> amendments now in question did not do so. Memorandum Decision and Order, dated September 13, 1973 at page 5, lines 9-13.

Thus if plaintiffs are to recover, their recovery must be outside of the basic written contract (as recovery of the overpayment was in the *Halver* case) and would result from an implied-in-law or quasi-contract. As such, the right of action must be limited by RCW 4.16.080, the three year statute of limitations. Accord: *Martin v. Spokane,* 55 Wn.2d 52, 345 P.2d 52, 345 P.2d 1113 (1959) (three year statute of limitations applies in a suit to collect sums not paid under a pension plan); *State ex rel. Bradford v. King County,* 197 Wash. 393, 85 P.2d 670 (1938) (three year statute of limitations applies as a bar to actions for the collection or recovery of pension benefits unlawfully withheld).

Having concluded that the three year statute of limitations applies, the question arises as to what, if any, actions are barred. The defendant argues that the entire cause of action arose on January 1, 1967, when the first pension increase was made. Thus a suit would have had to be filed by January 1, 1970, in order to recover. Defendant further maintains that because the 1971 increase was fundamentally the same, and more particularly because under any estoppel theory recovery would be based upon precisely the same representations made prior to the 1967 increase, no new cause of action arose at that time.

The Washington courts have held that pensions are, in essence, deferred compensation, *Bowen v. Statewide City Emp. Retirement System,* 72Wn.2d 397, 433 P.2d 150 (1967), a property right which is vested and which may be sued for, *Tembruell v. City of Seattle,* 64 Wn.2d 503, 392 P.2d 453 (1964). Furthermore, the person entitled to seek relief for unpaid pension benefits due *under a written contract* has a new cause of action at each time the right to the

unpaid amount was due--a new cause arising each month. *See, e.g., State ex rel. Bradford v. King County,* 197 Wash. 393, 85 P.2d 680 (1938). Under those circumstances, when the statute of limitations serves as a bar, it does so only to the extent of those rights accruing prior to the three years, and not to those arising subsequent to the three year bar, up to the time of filing the action.

The present action is distinguishable from that in the *Bradford* case in that no right to pension benefits has accrued under a written contract, as already determined in 1973. The pension benefits, if recoverable, are so only because of alleged representations made prior to the plaintiffs leaving General Electric in 1965, and culminating in their failure to receive the benefits granted on January 1, 1967, up to and including the granting of a second increase in 1971.

Without finding that any representations made were sufficient to give rise to a cause under an estoppel theory, this Court does find that if the representations gave rise to a cause of action, such cause arose not later than January 1, 1967, and that no new cause of action arose subsequent thereto. The pension increase of January 1, 1971, was a continuation of the same action of which plaintiffs complained in their action of January 1, 1967. No new or additional representations are shown. Unless the latter cause is based upon a separate and distinct set of circumstances, the statute of limitations controlling the first cause also controls the second and serves as a bar for both. *See Stueckle v. Sceva Steel Buildings,* 1 Wn.App. 391, 461 P2d 555 (1969).

Plaintiff seeks to subvert the statute of limitations issue by asserting that defendant was and is in the position of a trustee and, as between a trustee and a beneficiary, the statute of limitations does not run so long as the trust relationship subsists. *Arneman v. Arneman,* 43 Wn.2d 787,

264 P. 2d 256 (1953). If such a trust relationship exists between defendant and plaintiffs, it exists by reason of the General Electric Pension Plan, under which plaintiffs' rights have already been determined and found not to exist. Because plaintiffs are not now seeking benefits under the plan, but rather are seeking to have those rights extended to them regardless of the written declarations of the plan (because of the alleged representations made), there can exist no express trust granting to the plaintiffs the benefits and rights which they are seeking. Plaintiffs must first prove that as to the future benefits and rights claimed the defendant stands in the position of a trustee with the plaintiffs the beneficiaries. In the case of *Martin v. Spokane,* 55 Wn.2d 52, 345 P.2d 1113 (1959), wherein a similiar trust-relationship argument was raised, the court found that a specific and direct relationship of control must be established between the pension board and the control of the funds under a written contract or based upon statute, before an express trust will be found to exist. The evidence presented here by plaintiffs is simply not sufficient to find that such a trust relationship exists.

In summary, the court finds that the plaintiffs' cause of action for benefits arose at the time of the granting of the increased pension benefits by the General Electric Board of Directors on January 1, 1967, which benefits were not extended to plaintiffs. No new cause of action arose on January 1, 1971. The cause of action under which plaintiffs now proceed, equitable estoppel, is based upon representations outside of the written contract. To the extent their cause of action is based upon the written pension plan, their rights have been determined by this court; to the extent their rights are based upon representations outside the contract, their cause of action is barred by the three year statute of limitations. It being unnecessary to consider the other contentions raised by defendant in its

Motion to Dismiss, and it appearing that no further action lies with this matter, now therefore,

IT IS ORDERED:

1. That defendant General Electric Company's Motion to Dismiss is GRANTED; and the action is hereby DISMISSED.

2. The clerk is directed to send uncertified copies of this order to counsel of record.

DATED this 19th day of July, 1977.

s/WILLIAM J. LINDBERG
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Clement J. Sheeran, et al., Plaintiffs, vs. General Electric Company, Defendant.	No. 2843 ORDER

The MEMORANDUM decision filed by this court under date of July 20, 1977, is modified by deleting the second paragraph thereof (beginning on page 3, line 12) and substituting the following in its place:

"The plaintiffs maintain that because this suit is based fundamentally upon the written plan, the action lies under the six year statute as one "upon a contract in writing based upon implied liability arising out of the written agreement." Plaintiffs cite two cases, *McDonald v. Wockner,* 44 Wn.2d 261, 267 P.2d 782 (1954) and *Malcom v. Yakima County Consolidated School District,* 23 Wn.2d 80, 159 P.2d 394 (1945), in support of the principle that the six year statute of limitations applies. Both cases are distinguishable from the present action in that they involved enforcement of a written contract after subsequent attempted modifications were held invalid as against public policy. In each of those cases, the actual recovery allowed was based upon specific enforcement of the written contract. In the present action, of course, no recovery is possible upon the written contract, as already determined."

SO ORDERED THIS 26th day of July, 1977.

s/WILLIAM J. LINDBERG
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Clement J. Sheeran, et al.,
Plaintiffs-Appellants,
vs.
General Electric Company,
A New York corporation,
Defendant-Appellee

No. 77-2869
OPINION

Appeal from the United States District Court
for the Eastern District of Washington

Before: GOODWIN and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

This is an appeal from an order dismissing an action instituted by Clement J. Sheeran and 1529 other plaintiffs seeking increased pension benefits from General Electric Company. The plaintiffs asserted, *inter alia,* a claim of equitable estoppel. The district court held that this cause of action is barred by the State of Washington's three year statute of limitations. We affirm.

Factual and Procedural Background

The appellants are former employees of General Electric at the Hanford Project near Richland, Washington. They

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

left the employ of General Electric between 1965 and 1967 while the Atomic Energy Commission phased out its contract with General Electric. At the time his employment was terminated each appellant had sufficient service with General Electric to have acquired vested rights under the General Electric Pension Plan.

General Electric, by amendments to its Pension Plan in 1967 and 1971, granted pension increases to certain categories of beneficiaries. The amendments, however, specifically provided that the increases would not be granted to vestees, the category of beneficiaries which included appellants.

On April 26, 1972, the appellants brought suit in the Superior Court in Benton County, Washington, seeking a declaratory judgment that they were entitled to the 1967 and 1971 increases and all future increases in the pensions. General Electric removed the case to federal court. Appellants' motion to remand to state court was denied.

Appellants, through their complaint and the preliminary pretrial order, dated August 8, 1973, sought recovery under two theories: (1) direct recovery on the contract under the Pension Plan, and (2) indirect recovery on a theory of equitable estoppel. The court denied appellants' motion for summary judgment based on their contention that the "plain language of the pension plan" entitled them to the pension increases. Permission was granted appellants to take an interlocutory appeal.

This court in an unpublished order entered December 16, 1974, affirmed the district court and concluded that "inasmuch as this presumably disposes of the litigation, we assume that on remand judgment for the defendant will be entered". The Supreme Court denied a writ of certiorari on April 14, 1975, 421 U.S. 913.

No further action was taken in the district court until October 1, 1976, when the court, on its own motion, called

a status conference to determine if the remaining issue should be dismissed. Appellants then filed a motion to "deny entry of judgment" on the ground that their second theory of liability had not been determined, i.e., their claim that rights and benefits had been extended to them by reason of certain claimed oral or written representations. General Electric filed a motion to dismiss on four grounds, including its contention that the claims of estoppel were barred by the statute of limitations. Following a hearing the remaining claims were dismissed on this ground, the court concluding that they were barred by the State of Washington's three-year statute of limitations.

Issues on Appeal

Appellants contend that (1) the district court lacked jurisdiction and should have granted appellants' motion to remand to state court, and (2) the court erred in finding their claims of estoppel were barred by Washington's three year statute of limitations. Appellants did not seek in their interlocutory appeal to have the jurisdictional questions determined. Appellee contends that appellants therefore have waived their right to raise the issue of jurisdiction, and, in any event, the federal courts have jurisdiction.

Jurisdiction

(a) Diversity of Citizenship

While all of the 1530 plaintiffs were citizens of a state different from that of the defendant, only three satisfied the $10,000 amount in controversy requirements of 28 U.S.C. § 1352. The district court assumed ancillary jurisdiction of the remaining claims and orally denied plaintiffs' motion to remand. Before a formal order was entered, the plaintiffs filed a notice of voluntary dismissal of the three $10,000 claimants under Rule 41(a) of the Federal Rules of Civil Procedure. In an unpublished

memorandum and order entered December 4, 1972, the district court held that assuming the dismissal was valid, jurisdiction, once assumed, was retained over the remaining claimants.

(b) § 301(a) of the Taft-Hartley Act

The Pension Plan was available to 521 plaintiffs under the terms of collective bargaining agreements.[1] In its December 4, 1972 order the district court found that the "pension plan became an integral part of the collective bargaining agreements[2] and the individual union members [had] a right to sue under § 301(a) [of the Taft-Hartley Act, 29 U.S.C. § 185(a)] for enforcement of the plan". The court held further that, "The remaining claimants are properly before the court under the doctrine of ancillary jurisdiction."[3]

[1]In a pretrial order the parties agreed:

> That approximately *521 of the named plaintiffs were members of collective bargaining units* at the time they were employed by defendant and that the business of defendant in which said plaintiffs and defendants were engaged affected interstate commerce and *that the provisions of the Taft-Hartley Act were and are applicable with respect to the collective bargaining units.* (emphasis added)

[2]The district court noted that the "Pension Plan was considered and extensively modified in the 1963 Settlement Agreement between General Electric and the Hanford Guards Union Local 21. The 1964 Settlement Agreement between General Electric and the Hanford Atomic Metal Trades Council made the plan available to the union members and the plan was incorporated by reference into the agreement ."

[3]The court found that "1500 claims identical as to questions of law and fact strongly compelled consolidation of all claims before one tribunal for the sake of judicial economy".

It is well settled that an individual employee may bring suit for breach of a collective bargaining contract in Federal court under § 301(a) of the Taft-Hartley Act. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962). In *Evening News* the Court noted that, "the rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts". 371 U.S. at 200.[4] We agree with the district court that pension rights are within the scope of the terms "wages and "conditions of employment" and therefore are mandatory subjects for collective bargaining. See *Inland Steel Co. v. National Labor Relations Board,* 170 F.2d 247 (7 Cir. 1948), cert. denied on pension issue, 336 U.S. 960 (1949), *aff'd* on other issues *sub nom., United States Steelworkers of America v. NLRB,* 339 U.S. 382 (1950). The individual union members had a right to sue General Electric under § 301(a) for enforcement of the pension plan.

Appellants argue, however, that in their complaint they asserted no basis for § 301(a) jurisdiction - that they are not claiming a violation of any collective bargaining agreement as a basis for their claims. It is true that as a general rule a plaintiff has the prerogative of determining the theory of his action and, in the absence of fraud, may defeat removal to federal court by avoiding allegations which provide a basis for the assertion of federal jurisdiction. *Jones v. General Tire and Rubber Co.*, 541 F.2d 660, 664 (7 Cir. 1976).

[4]See also *Chemical Workers v. Pittsburg Glass,* 404 U.S. 157 (1971), where the Court noted that even though a union does not bargain for retirees, the retirees are not without protection under contract principles and that "a retiree would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed". 404 U.S. at 181, n. 20.

While appellants did not refer to the collective bargaining agreements in their complaint, they did allege a violation of the pension contract which was an integral part of the collective bargaining agreements. Moreover, as noted *supra* (note 1), they agreed in the pretrial order that 521 of the plaintiffs were members of collective bargaining units and that the provisions of the Taft-Hartley Act were applicable with respect to the collective bargaining units.

A suit for violation of labor contract is removable and federal law is applicable under § 301(a). *Johnson v. England,* 356 F.2d 44 (9 Cir.), *cert. denied* 384 U.S. 961 (1966).[5] It is true that *Johnson v. England* and related cases are not precisely in point since appellants rely upon an alleged violation of the provisions of the pension plan rather than the labor contract itself. It is undisputed, however, that the rights and benefits sought by 521 union employees were the subject of collective bargaining and that the pension plan was incorporated by reference in the labor contract. We conclude that the action was properly removed. In any event, appellants could have brought the action in federal court under § 301(a). For the reasons hereinafter set forth, we conclude that appellants accordingly are precluded from raising the remand issue on this appeal.

(c) Failure to Seek Review of Denial of Motion to Remand.

Where a motion to remand is denied, the propriety of removal is reviewable on appeal from the final judgment or by interlocutory appeal if the refusal to remand is certified under 28 U.S.C. § 1292(b).[6] Here, appellants did not

[5]*Johnson v. England* was an action by union representatives for arbitration under a labor contract requiring an employer to deposit money in a pension fund.

[6]See *e.g., Swanson v. Liberty National Insurance Co.*, 353 F.2d 12 (9 Cir. 1965); *Climax Chemical Co. v. C.F. Braun S. Co.*, 370 F.2d 616 (10 Cir. 1966), *cert. denied,* 386 U.S. 981 (1967).

seek an interlocutory appeal when their motion to remand was denied nor did they seek to raise the jurisdiction issue upon the interlocutory appeal from the order denying their motion for summary judgment, which was determinative of their claims seeking recovery on the contract under the Pension Plan.

There is a conflict among the circuits as to whether the removal question - a jurisdictional issue - should be reviewed "at the first available opportunity". Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction, § 3740 at page 769. Most of the cases have involved interlocutory appeals of orders granting or denying a preliminary injunction. They did not involve, as here, a final determination of the primary claim for relief.

Appellants argue that until now they have not had the opportunity to request appellate review of the district court's denial of their motion to remand. We cannot agree. Appellants' reliance upon *La Chemise Lacoste v. Alligator Co. Inc.,* 506 F.2d. 339 (7 Cir. 1974), *cert. denied,* 421 U.S. 937 (1975), in support of this contention is misplaced. In that case the plaintiffs "unsuccessfully attempted to have the removal question certified for review under 28 U.S.C. § 1292(b). There was an appeal from an order denying a motion for a preliminary injunction, which was reviewable under 28 U.S.C. § 1292(a). On that appeal the court did not consider the removal issue. Following a trial there was an appeal from a final judgment. On that appeal the court noted that, "in the absence of a certification under § 1292(b)," this "is the first opportunity in this court for review of the order denying the petition to remand". Accordingly the court rejected "appelee's contention that appellants by waiting until appeal from final judgment, have waived the right to challenge the denial of the motion to remand". In noting

that its analysis "is not inconsistent" with *Grubbs,*[7] the court stated that the plaintiff "did all it could have done by way of seeking review of the denial of its motion to remand". 506 F.2d at 341-342, n. 1.[8]

Appellants here did not attempt to have the remand issue certified for review, as in *Alligator.* Nor did they seek review of the remand issue in their first interlocutory appeal under § 1292(b). Instead that appeal was based solely on the order denying their motion for summary judgment. Appellants sought and obtained review of substantive issues resulting in a final determination of their claims under the Pension Plan. They also sought review in the Supreme Court. Since the federal court would have had original jurisdiction if the action had been filed in federal court, we conclude that the case had reached the point where the rule set forth in *Grubbs,* note 7, *supra,* is applicable, and the appellants are precluded at this late date from raising the removal issue on this appeal.[9]

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[7]*Grubbs v. General Electric Credit Corp.,* 405 U.S. 699 (1972). In that case the Court held that where after removal a case is tried on the merits without objection, the issue on appeal is not whether the case was properly removed, but whether the district court would have had original jurisdiction if the case had been filed in that court.

[8]Three justices dissented from the order denying certiorari in *Alligator,* concluding that *Grubbs, supra,* note 7, should be extended to require that the removal issue be raised on an interlocutory appeal from the denial of a preliminary injunction. There is, of course, more reason to apply *Grubbs* and require that the remand issue be raised in a case, such as this one, where the order was determinative of the primary claims for relief.

[9]Having reached this conclusion, it is unnecessary to consider the alternative ground of jurisdiction - diversity of citizenship - or the effect of the voluntary dismissal by three plaintiffs who met the $10,000 jurisdictional requirement.

Statute of Limitations

We agree with the district court that the estoppel claims are barred by Washington's three year statute of limitations and adopt Judge Lindberg's opinion on this issue as the opinion of this court. His opinion, which has not been published, follows:

The Revised Code of Washington contains two statutes of limitation applicable to contracts:

RCW 4.16.040 Actions limited to six years.
Within six years:

...

(2) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

RCW 4.16.080 Actions limited to three years.
Within three years:

...

(3) An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.

The plaintiffs maintain that because this suit is based fundamentally upon the written plan, the action lies under the six year statute as one "upon a contract in writing based upon implied liability arising out of the written agreement." Plaintiffs cite two cases, *McDonald v. Wockner,* 44 Wn.2d 261; 267 P.2d 97 (1954) and *Malcom v. Yakima County Consolidated School District,* 23 Wn.2d 80, 159 P.2d 394 (1945), in support of the principle that the six year statute of limitations applies. Both cases are distinguishable from the present action in that they involved enforcement of a written contract after subsequent oral contracts were held invalid. In each of those cases, the actual recovery allowed was based upon specific enforcement of the written contract. In the present action, of course, no recovery is possible upon the written contract, as already determined.

A thorough discussion of the Washington statutes of limitation is found in *Halver v. Welle,* 44 Wn.2d 288, 266 P.2d 1053 (1954). That case involved a written contract to build a house for a specified sum. Due to a subtraction error, the payment due on the contract was erroneously calculated to be $1000 more that it should have been. The incorrect sum was paid and, when discovered some five years later, the owners brought suit for recovery of the overpayment; defendants set up the three year statute of limitations as a bar. The court noted that the contract did not specify for a return of money in case of overpayment and then reviewed the Washington cases discussing the two statutes of limitation and their relationship to written contracts and implied-in-law or quasi-contracts. The court concluded that where an underlying obligation to pay upon a written contract existed, but where the specific payment sought to be recovered was not contemplated by the terms of that instrument, it could not be said to have been made on a written contract or agreement, and not being so made, the implied liability to repay did not arise out of a written instrument. Hence the three year statute of limitations applied.

> While necessary implication is as much a part of an instrument as an express provision is, the implication must, nevertheless, be such as is within the contemplation of the parties when making the contract, or else necessary to carry their intention into effect. Under such circumstances only will the law imply and enforce the obligation. *Id.* at 293.

Applying the *Halver* reasoning to the present action this court has found that a written pension plan existed, but that it contained no provisions for plaintiffs to receive the specific pension increases sought.

> No vestee, therefore, could have had a vested right to any increase granted by one of the amendments unless

such increase was granted specifically to vestees by the amendment itself. Obviously, the amendments now in question did not do so. Memorandum Decision and Order, dated September 13, 1973 at page 5, lines 9-13.

Thus if plaintiffs are to recover, their recovery must be outside of the basic written contract (as recovery of the overpayment was in the *Halver* case) and would result from an implied-in-law or quasi-contract. As such, the right of action must be limited by RCW 4.16.080, the three year statute of limitations. Accord: *Martin v. Spokane,* 55 Wn.2d 52, 345 P.2d 52, 345 P.2d 1113 (1959) (three year statute of limitations applies in a suit to collect sums not paid under a pension plan); *State ex rel. Bradford v. King County,* 197 Wash. 393, 85 P.2d 670 (1938) (three year statute of limitations applies as a bar to actions for the collection or recovery of pension benefits unlawfully withheld).

Having concluded that the three year statute of limitations applies, the question arises as to what, if any, actions are barred. The defendant argues that the entire cause of action arose on January 1, 1967, when the first pension increase was made. Thus a suit would have had to be filed by January 1, 1970, in order to recover. Defendant further maintains that because the 1971 increase was fundamentally the same, and more particularly because under any estoppel theory recovery would be based upon precisely the same representations made prior to the 1967 increase, no new cause of action arose at that time.

The Washington courts have held that pensions are, in essence, deferred compensation, *Bowen v. Statewide City Emp. Retirement Systems,* 72 Wn.3d 397, 433 P.2d 150 (1967), a property right which is vested and which may be sued for, *Tembruell v. City of Seattle,* 64 Wn.2d 503, 392 P.2d 453 (1964). Furthermore, the person entitled to seek

relief for unpaid pension benefits due *under a written contract* has a new cause of action at each time the right to the unpaid amount was due -- a new cause arising each month. See, *e.g., State ex rel. Bradford v. King County,* 197 Wash. 393, 85 P.2d 670 (1938).

The present action is distinguishable from that in the *Bradford* case in that no right to pension benefits has accrued under a written contract, as already determined in 1973. The pension benefits, if recoverable, are so only because of alleged representations made prior to the plaintiffs leaving General Electric in 1965, and culminating in their failure to receive the benefits granted on January 1, 1967. No "new" representations were made after 1967, up to and including the granting of a second increase in 1971.

Without finding that any representations made were sufficient to give rise to a cause under an estoppel theory, this court does find that if the representations gave rise to a cause of action, such cause arose not later that January 1, 1967, and that no new cause of action arose subsequent thereto. The pension increase of January 1, 1971, was a continuation of the same action of which plaintiffs complained in their action of January 1, 1967. No new or additional representations are shown. Unless the latter cause is based upon a separate and distinct set of circumstances, the statute of limitations controlling the first cause also controls the second and serves as a bar for both. See *Stueckle v. Sceva Steel Buildings,* 1 Wn.App. 391, 461 P.2d 555 (1969).

Plaintiffs seek to subvert the statute of limitations issue by asserting that defendant was and is in the position of a trustee and, as between a trustee and a beneficiary, the statute of limitations does not run so long as the trust relationship subsist. *Arneman v. Arneman,* 43 Wn.2d 787, 264 P.2d 256 (1953). If such trust relationship exists between defendant and plaintiffs, it exists by reason of the

General Electric Pension Plan, under which plaintiffs' rights have already been determined and found not to exist. Because plaintiffs are not now seeking benefits under the plan, but rather are seeking to have those rights extended to them regardless of the written declarations of the plan (because of the alleged representations made), there can exist no express trust granting to the plaintiffs the benefits and rights which they are seeking. Plaintiffs must first prove that as to the future benefits and rights claimed the defendant stands in the position of a trustee with the plaintiffs the beneficiaries. In the case of *Martin v. Spokane,* 55 Wn.2d 52, 345 P.2d 1113 (1959), wherein a similar trust-relationship argument was raised, the court found that a specific and direct relationship of control must be established between the pension board and the control of the funds under a written contract or based upon statute, before an express trust will be found to exist. The evidence presented here by plaintiffs is simply not sufficient to find that such a trust relationship exists.

In summary, the court finds that the plaintiffs' cause of action for benefits arose at the time of the granting of the increased pension benefits by the General Electric Board of Directors on January 1, 1967, which benefits were not extended to plaintiffs. No new cause of action arose on January 1, 1971. The cause of action under which plaintiffs now proceed, equitable estoppel, is based upon representations outside of the written contract. To the extent their cause of action is based upon the written pension plan, their rights have been determined by this court; to the extent their rights are based upon representations outside the contract, their cause of action is barred by the three year statute of limitations.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Clement J. Sheeran, et al., Plaintiffs-Appellants, vs. General Electric Company, A New York corporation, Defendant-Appellee	No. 77-2869 ORDER

Before: GOODWIN and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing.

Pursuant to Rule 12, Rules of Ninth Circuit Court of Appeals, Appellants' request for a rehearing in banc shall not be considered.

The petion for rehearing is denied.

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*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.